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Testimony of the Colorado Attorney General's Office in Support of S. 2065

I am Deputy Attorney General Renny Fagan. I am appearing on behalf of Colorado Attorney General Ken Salazar in support of S. 2065 introduced by Sen. Campbell and Sen. Allard. Attorney General Salazar was instrumental in initiating negotiations between the Southern Ute Indian Tribe (Tribe) and the State of Colorado that led to the air quality agreement which is the subject of S.2065. The final agreement is the result of cooperative efforts by the Southern Ute Indian Tribe, Governor Bill Owens, Attorney General Salazar and the Colorado Department of Public Health and Environment. Attorney General Salazar asks this Committee to support S. 2065, which if adopted by Congress, will be the final step necessary to fully implement the agreement.

Background

The Southern Ute Indian Tribe's Reservation consists of approximately 681,000 acres, located mainly in La Plata County, Colorado. The Reservation is a checkerboard of land ownership. About 308,000 surface acres are held in trust by the United States for the benefit of the Tribe ("trust lands.") Additionally, the Tribe owns the majority of the mineral estate underlying a majority of the Reservation lands. The remaining 378,000 surface acres are owned in fee by non-Indians or individual Tribal members ("fee lands"), or consist of national forest land.

In 1984, Congress enacted Public Law 98-290 which confirmed the exterior boundaries of the Reservation. The law also clarified that the Tribe has jurisdiction over the trust lands and Indians anywhere in the Reservation, and the State has jurisdiction over non-Indians on the fee lands.

Oil and natural gas production takes place throughout the Reservation. These facilities are stationary air pollution sources. Since 1970's, the State's Air Pollution Control Division has issued permits to non-Indian owned sources located on fee lands.

The Clean Air Act allows Indian tribes to be treated in the same manner as states to administer certain air quality programs. In 1998, the EPA issued regulations implementing these provisions of the Act. In July 1998, the Southern Ute Tribe applied to the EPA for treatment as a state for all lands within the Reservation. On the basis of PL 98-290, the State was prepared to object, claiming that it had jurisdiction over the non-Indian sources on the fee lands.

Instead of a potentially long and costly fight in the federal courts about who has jurisdiction over the fee lands, the Tribe and the State agreed to establish a single, cooperative air quality authority for all lands within the Reservation. Pursuant to an intergovernmental agreement (“the Agreement”), a joint Tribal/State Commission will establish air quality standards. When the Agreement is fully implemented, the Tribe will receive a delegation of authority from EPA to administer the air quality programs, but the delegation is contingent upon and shall last only so long as the Agreement and Commission are in place.

Since air does not know political boundaries, a single cooperative program will achieve the best result for everyone in the area. One program will also be more efficient for the governments and for the businesses that will be regulated. The Commission meets locally and will adopt a program suited to the needs of the Reservation and local area. The companies affected by air quality regulation support the Agreement.

We believe that this cooperative arrangement is the first of its kind in the country between a state and a tribe to regulate air quality. It is also unique to the circumstances of the Southern Ute Indian Tribe Reservation.

The Essential Provisions of the Reservation Air Program

On December 13, 1999, the Tribe, Governor Owens and Attorney General Salazar signed the Intergovernmental Agreement. As conditions precedent to full implementation, the Agreement requires the adoption of certain legislation by the Tribal Council, the Colorado General Assembly and Congress. In 2000, both the Tribe and the State enacted the necessary laws. When the Agreement is fully implemented, this is how the Reservation Air Program would work:

1. A Tribal/State Commission will establish air quality standards, promulgate rules and regulations pertaining to all lands and air pollution sources within the exterior boundaries of the Reservation.
2. The Commission consists of three members appointed by the Tribe and three State members appointed by the Governor. In 2001, the Tribe and the Governor each named their appointees. All actions of the Commission must be by majority vote of all members. The Commission is not a state agency.
3. The Commission’s other duties include holding public hearings, setting fees paid by the sources to fund the costs of the program, and conducting review of appealable administrative actions.
4. Over time, the Tribe will assume day-to-day responsibility for administering the air quality program, and will cooperate and coordinate with the Colorado Air Pollution Control Division. Eventually, the Tribe will administer the rules and regulations of the Commission.
5. Funding for the program will come from fees paid by air pollution sources or EPA grants. The Tribe will collect the fees and grants.

6. After the Commission is up and running, and after it adopts an air quality program for the Reservation, the Tribe will apply to the EPA to receive delegation to administer Clean Air Act programs.

7. Any delegation from the EPA to the Tribe is specifically conditioned upon the existence of the Intergovernmental Agreement and the Commission. The Tribe and the State believe that this cooperative effort will work for all people living in the La Plata County area and for the air pollution sources. The Agreement provides that the State and the Tribe will review how the program is working in three years and make any necessary adjustments. The Agreement also provides that either the State or the Tribe may terminate it at any time, by giving a one-year notice. If either the State or the Tribe terminate the Agreement, then any EPA delegation would cease and both parties would go back to the legal positions they held before the Agreement.

8. The Agreement provides that enforcement actions and judicial review of Commission administrative actions will occur in the federal courts.

The Need for S. 2065

Federal Jurisdiction The Agreement provides that the federal courts will be the judicial forum for the enforcement of regulatory orders of the Tribe or Commission and for the judicial review of final agency actions of the Commission. The Tribe and the State chose this forum for several reasons.

First, the parties sought to establish a cooperative air quality authority that balanced the sovereign interests of both parties. Neither party wanted to authorize the judicial system of the other party as having jurisdiction for judicial enforcement orders or review of commission actions. To do so would have given the courts of one sovereign authority over what is designed to be a joint regulatory authority. Therefore, the State and the Tribe viewed the federal courts as being a neutral forum. As such, ensuring that the federal courts have jurisdiction is a fundamental part of the Agreement.

Second, under the Agreement, the Commission serves as the “final agency action” for purposes of the air quality regulation. If the state and Tribe had not reached the agreement and if the EPA had stepped in to serve as the regulatory authority, then the federal district court would have jurisdiction over enforcement actions of EPA and the federal administrative procedure act would have governed judicial review of EPA final agency actions. In this respect, the Agreement provides that the Commission will serve the same functions or “stand in the shoes” of the EPA. Therefore, it seemed appropriate to provide that the federal courts would serve the same role as if EPA was the regulatory authority.

S. 2065 implements federal jurisdiction. Section 4 provides that the United States District Court for the district of Colorado shall have jurisdiction over action brought by the Tribe or the commission for declaratory or injunctive relief to enforce civil orders. Section 5 provides that any decision of the commission that would have been subject to appellate review if that

decision had been made by EPA is reviewable by the United States Court of Appeals for the Tenth circuit applying the same standard applicable to a final agency action of the EPA.

Tribal Authority. Under the Agreement, the State will support a delegation of “treatment as a state” status by EPA to the Tribe, but only so long as the Agreement and Commission remain in effect. Because of the unique nature of this delegation, both parties want to ensure that EPA is authorized to and will grant a delegation in these circumstances. Section 3(a) of the bill makes the necessary authorization to EPA.

While both the Tribe and the State are committed to the success of the joint reservation air program, the Agreement provides that either party may terminate the Agreement. Upon termination, both parties return to the legal positions they held prior the Agreement. Thus, the State would return to its legal position that the EPA is without authority to grant the Tribe regulatory authority over the fee lands. It is vital to the State that the federal legislation preserve this legal right. Section 3 (b) does so by providing that if the Agreement is terminated, the EPA “shall promptly take appropriate administrative action to withdraw” treatment as a state delegation to the Tribe.

Limited Scope of S. 2065. Public Law 98-290 sets forth jurisdiction of lands within the exterior boundaries of the Reservation. In establishing the Commission and the Reservation Air Program, the parties specifically provided that the Agreement did not affect any other aspect of the jurisdiction of either party regarding such lands. The State and the Tribe also want to ensure that Congressional enactment of S. 2065 will not be construed as changing in any way any other aspect of the existing jurisdiction. Section 6 of the bill clearly narrows the effect of this legislation.

Conclusion

The Agreement between the State and the Tribe for the joint regulation of air quality for all lands within the Reservation is a unique cooperative endeavor. Both parties believe that this cooperative regulatory authority is a practical solution to a potentially divisive legal conflict and a solution that will enhance air quality for all residents within the exterior boundaries of the Reservation. Adoption of S. 2065 will implement the provisions necessary at the federal level to fully implement the Agreement. Attorney General Ken Salazar urges your support of the bill.